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AUG 11 '76

Supreme Court, U. S.
FILED
AUG 10 1976
MICHAEL RODAK, JR., CLERK

No. 75-1721

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. CHADWICK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents contend (Br. in Opp. 9; emphasis in original) that "[b]ecause of the government's shifting stance throughout the prior proceedings, the theory now advanced by the government was never properly presented or addressed below and neither lower court based its decision on a *rejection* of it." We submit that this is inaccurate. The government has consistently objected to the application of a presumptive warrant requirement to the opening of respondents' footlocker.

Our brief in the court of appeals noted that the guiding standard of the Fourth Amendment is reasonableness, and that "[t]he test of 'reasonableness,' in turn, hinges upon the very purpose of the Fourth Amendment" (Br. 10).[1] We then argued that the history of the Fourth

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[1]A copy of this brief is being lodged with the Clerk of this Court.

Amendment demonstrates that "the sanctity of a house * * * enjoys a far more precious and valued role than that of a footlocker" (*ibid.*), that "the sanctity of one's home was the very reason for the Fourth Amendment itself," and that accordingly "the limitations applicable to warrantless searches of houses cannot—and should not—be applied to a footlocker in a doctrinnaire fashion" (*id.* at 11). We cited decisions from other circuits that have agreed with us that there is a "'constitutional difference' between a house and a suitcase" (*United States* v. *Mehciz*, 437 F. 2d 145, 147 (C.A. 9)) and therefore "would apparently allow the warrantless search of luggage for contraband upon the individual officer's determination of probable cause" (Pet. App. 16a). This brief adequately presented to the court of appeals both the question presented in our petition and the analysis with which our petition approached that question.

Indeed, the court below devoted nearly half of its discussion on this point to that "part of [the government's] argument" (Pet. App. 16a) suggesting that the government "may also be looking in the direction of liberalized luggage search rules approved in several other circuits" (*ibid.*). The court expressly declined to follow the reasoning of the cases cited in our brief (*id.* at 16a n. 7, 18a-19a). The dissenting judge relied on these cases, arguing that the warrantless search of the footlocker was proper. He emphasized, as had our brief, that "[n]o invasion of a house or other real property was involved in this case" (*id.* at 30a n. 1). Both the majority and dissenting opinions below thus addressed the question we have presented, and did so in the way we have presented it. Had the majority accepted our argument, it would have upheld the propriety of the search, as the dissenting judge urged.

2. Respondents also contend (Br. in Opp. 10) that our argument "chops up the case in a fashion which is neither logical nor factually defensible" because it distinguishes the opening of the footlocker from the opening of the suitcases. But the search of the suitcases had been justified as an "inventory" search below, a justification that presents problems distinct from those concerning the search of the footlocker on probable cause. Cf. *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976. Our position concerning the footlocker depends in part on the existence of probable cause to believe that it contained marijuana.[2] There was no similar probable cause to believe that the suitcases contained marijuana, and there is thus no illogic in our distinction.

3. Respondents argue (Br. in Opp. 3, 11 n. 10) that "confusion" has resulted from our decision not to seek review of the court of appeals' decision that Chadwick was not properly arrested. They state that it is "absurd" to seek to introduce the fruits of the footlocker search against Chadwick in light of the lower courts' finding that, at the time of Chadwick's arrest, the information known to the agents did not show that Chadwick had a possessory interest in the footlocker sufficient to allow the agents to "infer [that Chadwick had] knowledge of the contents" (Pet. App. 25a, 40a-43a).

The connection respondents attempt to make between the issue of the footlocker search and that of Chadwick's arrest is a frail one. The validity of Chadwick's arrest was at issue below primarily because of the government's desire to offer in evidence statements that he made to an

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[2]We recognize the danger, adverted to by the court of appeals (Pet. App. 13a n. 4) that "if the mere fact of arrest were to allow an unlimited baggage search, it might be feared that people would be arrested on technicalities in order to search all their belongings."

agent following his arrest. Having found that Chadwick's arrest was without probable cause, the district court went on to find that the statements to the agent were "tainted" by the illegal arrest (Pet. App. 24a). Chadwick's arrest does not "taint" the footlocker search, however, since the seizure and search of the footlocker were not the product of his arrest. The evidence therefore should be admissible against Chadwick, although it may not by itself be sufficient to convict him.[3]

In any event, our arguments apply with full force to respondents Machado and Leary. Whatever weaknesses there may be in the government's attempt to prosecute respondent Chadwick, they afford no support to those respondents.[4] The issue whether the agents properly opened the footlocker without a warrant is analytically separable from the other issues presented in the court of appeals, and our decision to petition for a writ of certiorari on that issue alone results in neither "confusion" nor a distortion of the record.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[3]Respondent Chadwick's asserted lack of a possessory interest in the footlocker would be a defense on the merits at trial, but he should not be allowed to convert it into grounds to challenge the *admissibility* of the footlocker or its contents. Indeed, his assertion, if true, merely establishes his lack of standing to challenge the search of the footlocker.

[4]Cf. Pet. 18 n. 12, which concedes that in some respects respondent Chadwick's claims stand on a different footing from those of respondents Machado and Leary.